U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue date: 29May2002

Case No.: 2000-BLA-0059

In the Matter of:

CARRIE E. DEVINE, Widow of and o/b/o
the Estate of GEORGE M. DEVINE, JR.,
Claimant

v.

PEABODY COAL COMPANY,
Employer

OLD REPUBLIC INSURANCE COMPANY,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:[1]

Joseph H. Kelley, Esq.,
For the Claimant

Phillip J. Reverman, Jr., Esq.
For the Employer

Before: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901, *et seq.*, as amended (Act). In accordance with the Act and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs (OWCP). The regulations issued under the Act are located in Title 20 of the Code of Federal Regulations, and regulation

[1] The Director, OWCP, was not represented at the hearing.

section numbers mentioned in this Decision and Order refer to sections of that Title.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. Survivors of persons who were totally disabled at the time of their death or whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment and is commonly known as black lung.

A formal hearing in this case was held in Madisonville, Kentucky, on November 28, 2001. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder. The findings and conclusions which follow are based upon my observation of the appearance and the demeanor of the witness who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law. The Claimant filed a post-hearing brief which has been considered.

I. STATEMENT OF THE CASE

The Miner, George M. Devine, Jr., filed his first claim for black lung benefits on December 20, 1982 (DX 26). Administrative Law Judge V. M. McElroy denied the claim by Decision and Order dated March 2, 1987 (DX 26). Judge McElroy found that the Miner had pneumoconiosis, but failed to establish total disability (DX 26). The Miner did not appeal and the decision became final (DX 29). The Miner filed a second claim for benefits on July 16, 1998 (DX 27, p. 96). OWCP denied the claim on November 9, 1998, at which time the Miner was notified that he could request a hearing before the Office of Administrative Law Judges within sixty days (DX 27, p. 30). The Miner submitted additional evidence and filed a timely request for a hearing before the Office of Administrative Law Judges on January 6, 1999 (DX 27, p. 29). The Miner died on January 30, 1999. OWCP reconsidered the newly submitted evidence and again denied the Miner's claim on May 19, 1999 (DX 27, p. 4). The Miner's Widow did not appeal OWCP's denial. In a letter dated August 3, 1999, OWCP wrote that the Miner's claim was administratively closed and deemed abandoned (DX 27). The Miner's Widow, appearing on behalf of the estate of the Miner, argues that the Miner's claim was not abandoned because the Miner filed a timely request for a hearing before the Office of Administrative Law Judges on January 6, 1999.

The Claimant, Carrie E. Devine, filed a survivor's claim for benefits on February 16, 1999 (DX 1).[2] A Notice of Claim was sent to the Employer, Peabody Coal Company, on February 18, 1999 (DX 14). The Employer and the Carrier, Old Republic Insurance Company, filed a Notice of Controversion on March 2, 1999 (DX 15). OWCP issued a Notice of Initial Finding on May 19, 1999 and made an Initial Determination Awarding Benefits on August 23, 1999 (DX 17, 21). The Employer and the Carrier appealed and requested a formal hearing (DX 23, 24). The claim was transferred to the Office of Administrative Law Judges on October 20, 1999 (DX 28).

II. ISSUES

The specific issues presented for resolution in the Miner's and Widow's claims as noted on Form CM-1025 and at the formal hearing are as follows (DX 29; Tr. 13-15):[3]

1. Whether the Miner had pneumoconiosis as defined by the Act and the regulations;

2. Whether the Miner's pneumoconiosis arose out of coal mine employment;

3. Whether the Miner's death was due to pneumoconiosis;

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[2] In this Decision and Order, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the transcript of the November 28, 2001 hearing.

[3] The Employer withdrew controversion to the following Issues at the hearing: whether the claim was timely filed; whether the person upon whose death or disability the claim is based was a miner; whether the Miner worked at least 35 years in or around one or more coal mines; whether the Claimant is an eligible survivor of a miner; whether the named Employer is the Responsible Operator; and, whether the Miner's most recent period of cumulative employment of not less than one year was with the named Responsible Operator.

4. Whether the Miner was totally disabled;[4]

5. Other issues:[5]

   a. Whether the regulations are constitutional; and,

   b. Whether the Responsible Operator is liable for medical and/or legal expenses.

Request for Reconsideration

At the November 28, 2001 hearing, counsel for the Claimant objected to the admission of Employer's Exhibits 2, 3, and 5, and part of Exhibit 4, on the grounds that they are cumulative (Tr. 11). This objection was overruled, and Employer's Exhibits 2, 3, 4, and 5 were admitted (Tr. 11). In his post-hearing brief, counsel for the Claimant requested that the Administrative Law Judge reconsider this ruling, arguing that the superior financial resources of the Employer undermine the truth-seeking function of the administrative process by allowing the Employer to develop a greater quantity of evidence. *See* Brief for Claimant, p. 3, *citing Woodward v. Director, OWCP,* 991 F.2d 314 (6th Cir. 1993). Counsel for the Claimant further argued that the Administrative Law Judge should reconsider admission of Employer's Exhibits 2-5 because the recently promulgated administrative regulations now limit the Employer to only one consulting opinion on rebuttal and because the opinions expressed by the Employer's experts are cumulative and hostile to the Act. *See* Brief for Claimant, p. 4.

The Sixth Circuit's holding in *Woodward* dictates that when embarking on an inquiry involving cumulative evidence, an administrative fact finder must make a qualitative evaluation of the evidence instead of relying on a mere "head-counting" approach. *See Woodward,* 991 F.2d at 321. Additionally, pursuant to § 725.2(c), all claims that were pending before the revision of the Act on January 19, 2001 shall be decided under the pre-revision version of § 725.414. This claim was pending at the time of the revision, thus the pre-revision language of the Act will be

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[4] Total disability due to pneumoconiosis remains an Issue in the Miner's claim. At the formal hearing, the Employer argued that the Miner's claim is not an active claim, while the Claimant argued that the Miner's claim should be considered by the Administrative Law Judge because the Miner made a timely request for a hearing on January 6, 1999 (Tr. 13-14).

[5] These Issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act; therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

applied. Therefore, I find that Employer's Exhibits 2-5 are admissible. The request for reconsideration is denied.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The Miner, George M. Devine, Jr., was born on June 27, 1921 and died on January 30, 1999, at the age of seventy-seven (DX 7). The Claimant, Carrie E. Devine, married the Miner on October 25, 1941, has not remarried, and is the surviving spouse of the Miner (DX 1, 6). There are no other dependents for the purpose of augmentation of benefits (DX 1).

Smoking History

In his March 2, 1987 Decision and Order Denying Benefits, Judge McElroy did not make a finding as to the Miner's smoking history (DX 26). In his March 9, 1983 deposition, the Miner stated that he had been smoking for twenty years and continued to smoke at the rate of "less than a half a pack a day" (DX 26). At the November 28, 2001 hearing, the Miner's Widow testified that the Miner smoked one pack of cigarettes every four or five days for the first fifteen years that they were married (Tr. 26).

The examining physicians reported varying smoking histories. Dr. Eric Norsworthy wrote in his January 30, 1999 examination report that the Miner "use to smoke years ago but hasn't smoked for at least 10-15 years" (DX 9). In his August 6, 1998 examination report, Dr. Simpao reported that the Miner smoked two packs of cigarettes per day from 1961 to 1975 (DX 27, pp. 53-56, 58). In his January 18, 1983 examination report, Dr. Simpao wrote that the Miner smoked one-half pack of cigarettes per day for twenty years (DX 26). Dr. Anderson wrote in his October 18, 1982 examination report that the Miner started smoking at age forty and smoked between three-quarters and one pack of cigarettes per day (DX 26). In his May 24, 1983 examination report, Dr. Gallo noted that the Miner smoked one-half to one pack of cigarettes per day for the past twenty years (DX 26). Dr. Lane wrote in his March 1, 1983 examination report that the Miner smoked one-half to one pack of cigarettes per day for twenty years (DX 26). In his July 15, 1982 examination report, Dr. Robert E. Norsworthy wrote that the Miner started smoking when he was forty years old and continues to smoke at the rate of one pack of cigarettes per day (DX 26).

Based on the testimony of the Miner's Widow, I find that the Miner smoked one pack of cigarettes every four days, from 1941 through 1956, for a total of fifteen years, or three and three-quarters pack years. While none of the physicians of record noted a smoking history prior to 1956, I found the Widow to be a credible witness. Dr. Simpao first reported that the Miner smoked two packs

of cigarettes per day from 1961 through 1975, then later reported that the Miner smoked one-half of a pack of cigarettes per day from 1963 through 1983. Drs. Anderson, Gallo, and Robert E. Norsworthy all uniformly reported that the Miner smoked as much as one pack of cigarettes per day from 1961 through 1983. Based on the histories reported by the examining physicians, I find that the Miner smoked one pack of cigarettes per day from 1961 through 1983, for a total of twenty-two years. Therefore, I find that the Miner had a total smoking history of
twenty-five and three-quarters pack years.

Length of Coal Mine Employment

The Claimant alleged thirty-five years of coal mine employment on the CM-911a Employment History form and at the formal hearing (DX 2; Tr. 18). The Employer withdrew controversion to the length of coal mine employment at the formal hearing (Tr. 13). In his March 2, 1987 Decision, Judge McElroy found that the Miner established thirty-five years of coal mine employment (DX 26). The Miner alleged thirty-five years of coal mine employment on his Employment History form completed on December 16, 1982 as part of his first application for benefits (DX 26). This is supported by a letter from D.R. Butler, Human Resources Director of Peabody Coal Company, dated June 18, 1982 (DX 26). An employment history form completed by the claimant at the time he filed an application for benefits does not need to be corroborated to be found credible and, standing alone, may be the basis for a finding of length of coal mine employment. *Harkey v. Alabama By-Products Corp.,* 7 B.L.R. 1-26 (1984). Based on the Employment History forms completed by the Miner and the Claimant, and the letter from Peabody Coal Company, I find that the Miner worked at Peabody Coal Company in Beaver Dam, Kentucky, from 1947 to 1982, for a total of thirty-five years. As the Miner's coal mine employment took place in the Commonwealth of Kentucky, the law of the Sixth Circuit Court of Appeals applies.

Responsible Operator

Peabody Coal Company does not contest its designation as the Responsible Operator. This is supported by the evidence of record and I so find.

IV. MEDICAL EVIDENCE DATED SUBSEQUENT TO MARCH 2, 1987

The following medical evidence is dated subsequent to March 2, 1987, the date of the final denial of the Miner's claim:

A. X-ray Studies

	Date	Exhibit	Doctor	Reading	Standards
1.	1/26/99	DX 9, 10	Park	Pneumo.	Not

				not noted	noted
2.	1/26/99	DX 12	Sargent B reader[6] Board cert.[7]	No pneumo.	Good
3.	11/24/98	DX 9, 10	Sison	Pneumo. not noted	Not noted
4.	11/24/98	DX 12	Sargent B reader Board cert.	No pneumo.	Good
5.	8/6/98	DX 27, p. 36	Wheeler	No pneumo.	Fair

[6] A "B reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51 (b)(2).

[7] A Board-certified Radiologist is a physician who is certified in Radiology or Diagnostic Roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* § 718.202 (a)(ii)(C).

	Date	Exhibit	Doctor	Reading	Standards
6.	8/6/98	DX 27, p. 38	Wiot B reader Board cert.	No pneumo.	Good
7.	8/6/98	DX 27, p. 59	Sargent B reader Board cert.	No pneumo.	Poor
8.	8/6/98	DX 27, p. 60; DX 9	Westmoreland	Pneumo. not noted	Not noted
9.	8/6/98	DX 27, p. 61	Simpao	2/2, p,p	Good
10.	11/22/91	DX 9	Fulton	Pneumo. not noted	Not noted
11.	11/22/91	DX 12	Sargent B reader Board cert.	No pneumo.	Poor
12.	11/22/88	DX 12	Sargent B reader Board cert.	No pneumo.	Poor

B. Pulmonary Function Studies

	Date	Exh.	Doctor	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Standards
1.	9/23/98	DX 9	O'Bryan	Not noted	1.22	1.59	Not noted	77%	Not noted

Comment: "Post-Bronchodilator no significant change is noted but best FEV_1 is 1.39 liters. TLC by helium dilution is 54%."

Validation: Dr. Fino wrote that this spirometry was invalid "due to a premature termination to exhalation, a lack of reproducibility in the expiratory tracings, and a lack of an abrupt onset to exhalation" (EX 3). Dr. Branscomb wrote that this pulmonary function test was not valid because no tracings are available (EX 2).

	Date	Exh.	Age/ Doctor	Height	FEV_1	FVC	FEV_1/ MVV	FVC	Standards
2.	8/6/98	DX 27, p. 65	Simpao	77/65"	1.64	2.16	29	76%	Good coop. and comp.; three tracings.

Comment: Moderate degree of both restrictive and obstructive airway disease.

Validation: Dr. Fino wrote that this spirometry is invalid because of a premature termination of exhalation and a lack of reproducibility in the expiratory tracings (EX 3). Dr. Branscomb wrote that this spirometry is invalid because: no matches were obtained; maximum flow was not achieved until almost halfway through the breath, requiring excessive back extrapolation; no plateau was available because expiration was continuing when the test was terminated; and, MVV breaths were much too slow, with excessive time spent in reversing the direction of breathing (EX 2).

C. Arterial Blood Gas Studies

	Date	Exhibit	Doctor	pCO_2	pO_2
1.	8/6/98	DX 27, p. 62	Simpao	36.1	94.1

Comment: No exercise arterial blood gas study due to heart condition, angina, and increased shortness of breath; within normal limits.

D. Death Certificate

The Miner's death certificate, completed by Dr. Eric Norsworthy, lists the date of death as January 30, 1999, and the immediate cause of death as lung cancer with metastatic disease, due to or as a consequence of bladder cancer; arteriosclerotic heart disease, due to or as a consequence of chronic obstructive pulmonary disease, due to or as a consequence of coal miner's black lung disease (DX 7).

E. Examination Reports

1. a. Dr. William M. O'Bryan examined the Miner on September 23, 1998, at which time he reviewed the Miner's symptoms and his medical history (dyspnea on exertion; "coughs daily brings up mostly yellow phlegm"), and performed a physical examination, pulmonary function study, arterial blood gas study ("O_2 saturation at rest is 99% and post exercise is 97%"), and interpreted an x-ray ("background of a category 1 pneumoconiosis with cardiomegaly"). Dr. O'Bryan diagnosed: (1) right lower lung mass, strongly suspect a primary carcinoma of the lung; (2) restrictive lung disease

secondary to pneumoconiosis and possible IPF, severe impairment; (3) organic heart disease status post-CABG; (4) oral-agent dependent diabetes; and, (5) hypertension (DX 9; DX 27, pp. 50-51).

b. Dr. O'Bryan wrote a letter to Dr. Norsworthy following his examination of the Miner on September 23, 1998, in which he opined that the Miner "does have a category 1 pneumoconiosis. In addition to this, he has a mass in his right lower lobe which needs further evaluation" (DX 9).

2. Dr. Valentino S. Simpao examined the Miner on August 6, 1998, at which time he reviewed the Miner's symptoms and his occupational (thirty-five and one-quarter years coal mine employment), medical (coughs up greenish-yellow and bloody sputum; wheezing; dyspnea at rest and exertion; chest pain on exertion), smoking (smoked two packs per day from 1961 to 1975), and family histories, and performed a physical examination, pulmonary function study (moderate degree of both restrictive and obstructive airway disease), arterial blood gas study (normal), and interpreted an x-ray ("CWP 2/2 - abnormal - well defined soft tissue mass RLL"). Dr. Simpao diagnosed "CWP 2/2," based on the Miner's "multiple years of coal dust exposure ... findings on chest x-ray and pulmonary function test along with physical findings and symtomotology [sic]." In his opinion, the Miner has a moderate pulmonary impairment related to pneumoconiosis and does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment, based on "objective findings on chest x-ray and pulmonary function test along with symptomotology [sic] and physical findings as noted in the report" (DX 27, pp. 53-56, 58).

3. a. Office visit notes from Dr. Eric Norsworthy[8] dated from 1986 through 1999 diagnose coal workers' pneumoconiosis, COPD, hypertension, pulmonary malignancy with extensive metastatic disease, and presumed bladder malignancy (DX 9).

b. Dr. Eric Norsworthy issued a response to questions posed by OWCP on May 11, 1999. He wrote that the Miner "had both chronic obstructive pulmonary disease + coal workers' pneumoconiosis," and that the Miner's death was caused or hastened by his exposure to both cigarettes and coal workers' pneumoconiosis (DX 11).

c. Dr. Eric Norsworthy testified by deposition on October 31, 2001, at which time he stated that the Miner was diagnosed as suffering from coal workers' pneumoconiosis by

[8] Prior to 1986, the Miner was treated by Dr. Robert E. Norsworthy. Dr. Robert E. Norsworthy died, and his son, Dr. Eric Norsworthy, began treating the Miner in 1986 (CX 1, p. 4).

Dr. Robert E. Norsworthy and Dr. Anderson, a Pulmonologist, and that he later diagnosed the Miner as suffering from coal workers' pneumoconiosis based on his treatment of the Miner and the Miner's x-rays and symptoms (CX 1).

d. Dr. Eric Norsworthy testified by deposition on January 11, 2000, at which time he stated that he treated the Miner from April 15, 1986 until the Miner's death in 1999. Dr. Norsworthy stated that the Miner related to him that he had been previously diagnosed with coal workers' pneumoconiosis when he came under his care. Dr. Norsworthy opined that the Miner's bladder cancer "may have resulted from inhalation of lime dust used to press coal dust in the coal mines" (EX 4).

4. a. Hospital records from Ohio County Hospital dated from January 26, 1999 to January 31, 1999, include reports by Drs. Norsworthy, Desai, and Park which discuss treatment of the Miner for pulmonary malignancy with extensive metastatic disease and presumed bladder malignancy. These records do not diagnose or mention pneumoconiosis (DX 9, 10).

b. Dr. Bruce E. Burton performed a CT Scan of the Miner's chest on August 20, 1998 at Ohio County Hospital and did not mention pneumoconiosis (DX 9, 10).

c. Hospital records from Ohio County Hospital dated June 2, 1998 include a report by Dr. William C. Harrison regarding pain in the Miner's left hand, and do not mention pneumoconiosis (DX 10).

F. Consultative Reports

1. a. Dr. Gregory J. Fino, a B reader and Board-certified Internist and Pulmonologist, reviewed medical evidence dated from 1988 through 1999, including twelve readings of chest x-rays dated from November 1988 through January 1999; two pulmonary function tests, dated August 6, 1998 and September 23, 1998; one arterial blood gas study, dated January 28, 1999; the Miner's death certificate; medical examination reports dated August 1994 through January 1999, including a report by Dr. O'Bryan dated September 23, 1998; a CT scan dated August 20, 1998; and hospital records dated January 23, 1999 through January 30, 1999. He issued a consultative report dated December 15, 1999, in which he opined: (1) there is insufficient medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis; (2) the Miner did not suffer from an occupationally acquired pulmonary condition; (3) there was no respiratory impairment demonstrated; (4) from a respiratory standpoint, the Miner was not disabled from returning to his last mining job or a job requiring similar effort, prior to his development of lung cancer; (5) even assuming that the Miner had medical or legal pneumoconiosis, it did not contribute to his

disability, and "he would have been as disabled had he never stepped foot in the mines;" and, (6) "[the Miner] would have died as and when he did due to lung cancer had he never stepped foot in the mines" (EX 3).

b. In a letter dated February 11, 2000, Dr. Fino wrote that there is "no medical literature which establishes a relationship between lime dust and bladder cancer" (EX 5).

2. a. Dr. Ben V. Branscomb, a Board-certified Internist and Pulmonologist, reviewed medical evidence dated from 1987 through 1999, including Dr. Simpao's August 6, 1998 examination report; office progress notes from Dr. Eric Norsworthy, dated February 5, 1997 through November 24, 1998; an August 20, 1998 examination report by Dr. Burton; Dr. O'Bryan's September 23, 1998 examination report; hospital records dated January 26, 1999 through January 30, 1999; the Miner's death certificate; and, two pulmonary function tests, dated June 8, 1998 and September 23, 1998. He issued a consultative report dated November 29, 1999 in which he opined that the Miner "did not contract an occupational lung disease associated with coal mine employment," and that "[t]he [Miner's] medical records contain no reasonable objective basis for concluding there was any pulmonary disability prior to his terminal illness." According to Dr. Branscomb, the pulmonary disability suffered by the Miner was due to "rapidly spreading cancer" that was "neither caused, aggravated, or accelerated by dust exposure." Dr. Branscomb concluded that, even if the Miner had simple pneumoconiosis, the record "contains no indication that such pneumoconiosis was disabling," and it did not cause, aggravate, or accelerate his death from cancer (EX 2).

b. In a letter dated January 18, 2000, Dr. Branscomb wrote, "with a high level of medical certainty I know that it is not an accepted concept in medicine that lime [causes] bladder cancer." Dr. Branscomb stated that "it has been well established since at least 1955 that cigarette smoking increases the risk of bladder cancer" (EX 5).

3. Dr. P. Raphael Caffrey, a Board-certified Anatomical and Clinical Pathologist, reviewed nine chest x-ray interpretations, dated from November 22, 1988 through January 26, 1999; medical records from Dr. Eric Norsworthy, dated from 1998 through 1999; Dr. O'Bryan's September 23, 1998 examination report; Dr. Simpao's August 6, 1998 examination report; and the Miner's death certificate, and issued a consultative report dated November 4, 1999. Dr. Caffrey opined that the Miner "had a significant smoking history," based on Dr. Simpao's report that the Miner "smoked from 1961 to 1975 at two packs of cigarettes per day." Dr. Caffrey wrote that he "could not objectively say" whether the Miner did or did not have coal workers' pneumoconiosis. He opined that the Miner's death was due to carcinoma, and that even if he had

pneumoconiosis, it was a "mild degree of simple coal workers' pneumoconiosis [and] did not contribute to or hasten his death." According to Dr. Caffrey, any pulmonary problems that the Miner suffered were caused by his years of smoking cigarettes, and then to lung cancer (EX 1).

4. Dr. Echols A. Hansbarger, Jr., a Board-certified Pathologist and Forensic Physician, reviewed "numerous reports of chest x-ray examinations, numerous pulmonary function studies and other items," as well as the Miner's death certificate, and Dr. Wiot's September 18, 1998 chest x-ray reading, and issued a consultative report dated November 2, 1999. Dr. Hansbarger opined that the Miner died "as a direct result of carcinoma of the lung with metastatic disease," and that "[h]e additionally suffered from arteriosclerotic heart disease and chronic obstructive pulmonary disease." Dr. Hansbarger opined that the Miner did not suffer from coal workers' pneumoconiosis or any other occupational pneumoconiosis of the lung, based on a review of the evidence, and specifically on Dr. Wiot's chest x-ray report. Dr. Hansbarger wrote that the "carcinoma of the lung which caused [the Miner's] death was, undoubtedly, related to a long pack year history of cigarette smoking and not related in any way, shape or form to his history of coal mine employment." According to Dr. Hansbarger, the Miner's death was not contributed to, caused by, or hastened by coal mine employment, and, even if the Miner suffered from "a mild focal degree of coal workers' pneumoconiosis of the simple variety" there was no "impact on his demise since the cause of his death was carcinoma of the lung which is not related to occupational exposure to coal dust" (EX 1).

5. Dr. N.K. Burki reviewed "a copy of all medical evidence in the . . . miner's Federal Black Lung claim," provided by OWCP on October 1, 1998 (DX 27, p. 48). Dr. Burki issued a consultative report dated October 10, 1998, in which he opined that the Miner had no occupational disease which was caused by his coal mine employment. Dr. Burki wrote that the Miner has no impairment, and that he has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Dr. Burki opined: (1) the Miner has coronary artery disease for which he has undergone coronary artery surgery; (2) the chest radiographs indicate no pneumoconiosis; (3) the spirometry tracings are invalid due to suboptimal effort; and, (4) the arterial blood gases are quite normal. According to Dr. Burki, the Miner exhibited, "no radiographic evidence of pneumoconiosis and no objective evidence of pulmonary dysfunction" (DX 27, p. 47).

VI. MEDICAL EVIDENCE DATED PRIOR TO MARCH 2, 1987

The following medical evidence is dated prior to March 2, 1987, the date of the final denial of the Miner's claim.

A. X-ray Studies

	Date	Exhibit	Doctor	Reading	Standards
1.	4/15/86	DX 26	Baumgarten	Pneumo. not noted	Not noted
2.	6/29/83	DX 26	Not noted	No pneumo.	Not noted
3.	5/24/83	DX 26	Trover	"Pneumo. category 1p"	Not noted
4.	3/1/83	DX 26	Felson[9] B reader Board cert.	No pneumo.	Good

[9] Dr. Felson was deposed on June 2, 1983, at which time he recounted his earlier findings and opined that the Miner's March 1, 1983 x-ray showed no evidence of coal workers' pneumoconiosis (DX 26).

	Date	Exhibit	Doctor	Reading	Standards
5.	1/8/83	DX 26	Wiot B reader Board cert.	No pneumo.	Poor
6.	1/8/83	DX 26	Cole B reader Board cert.	2/1, p,s	Fair
7.	1/8/83	DX 26	Stokes Board cert.	3/2, p	Good
8.	9/13/82	DX 26	Beck	Pneumo. not noted	Not noted
9.	8/6/82	DX 26	Not noted	Pneumo. not noted	Not noted
10.	3/26/79	DX 26	Smock	Pneumo. not noted	Not noted
11.	11/19/73	DX 26	Coffman	Pneumo. not noted	Not noted

B. Pulmonary Function Studies[10]

	Date	Exh.	Doctor	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Standards
1.	6/29/83	DX 26	O'Neill	62/66.5"	1.73	2.59	27	67%	Fair coop.; Comp. not noted; three tracings.

Comment: Invalid study due to inadequate effort.

Validity: Dr. Anderson wrote that this is an invalid study due to inadequate effort (DX 26)

[10] Because the physicians conducting pulmonary function studies noted varying heights, I must make a finding on the Miner's height. *See Protopappas v. Director, OWCP,* 6 B.L.R. 1-221, 1-223 (1983). Based on the height noted by a majority of physicians, I find the Claimant's height to be 67 inches.

	Date	Exh.	Age/ Doctor	Height	FEV_1	FVC	FEV_1/ MVV	FVC	Standards
2.	5/24/83	DX 26	Gallo	61/68"	1.39	2.19	26	63%	Good coop. and comp.

Comment: Tracings not optimal.

Validity: Dr. O'Neill wrote that this study is invalid due to "inconstant effort" (DX 26); Dr. Anderson stated that this study is invalid due to inadequate effort (DX 26).

3.	3/1/83	DX 26	Lane	Not noted	1.48	2.35	33	63%	Not noted; three tracings.

Validity: Dr. O'Neill wrote that this is an invalid study (DX 26); Dr. Anderson stated that this is an invalid study due to inadequate effort (DX 26).

4.	1/18/83	DX 26	Simpao	61/67"	1.46	1.90	29	77%	Fair coop.; comp. not noted; three tracings.

Comment: "The patient's poor effort and fair cooperation on numerous attempts render this test unreadable."

Validity: Dr. O'Neill wrote that this is an invalid study (DX 26); Dr. Anderson stated that this is an invalid study due to inadequate effort (DX 26).

5.	7/16/82	DX 26	Norsworthy	61/Not noted	Data unreadable

Comment: "Poor attempts at complete emptying of lungs - pt. would only use minimal force. Stated he had 'no wind'."

Validity: Dr. O'Neill wrote that this is an invalid study (DX 26); Dr. Anderson stated that this is not an acceptable study because maximal effort was not exerted (DX 26).

C. Arterial Blood Gas Studies

	Date	Exhibit	Doctor	pCO_2	pO_2
1.	6/29/83	DX 26	O'Neill	36.1	82.6
2.	5/24/83	DX 26	Gallo	36	84
3.	3/1/83	DX 26	Lane	37.6	74.4

	Date	Exhibit	Doctor	pCO_2	pO_2
4.	1/18/83	DX 26	Simpao	40.7	77.5

D. Examination Reports

1. a. Dr. William H. Anderson, a Board-certified Internist and Pulmonologist, examined the Miner on October 18, 1982, at which time he reviewed the Miner's symptoms and his occupational ("35 years in mining, all hauling coal on surface mining"), medical (short of breath, productive cough, chest pain on exertion), smoking ("started smoking at age 40, between 3/4 and one pack of cigarettes per day"), and family histories, and performed a physical examination, pulmonary function study ("[h]e was not sufficiently cooperative as to allow us to achieve reportable results"), arterial blood gas study, and interpreted an x-ray ("category 2 pneumoconiosis"). Dr. Anderson diagnosed: (1) category 2 pneumoconiosis, based on the Miner's chest x-ray; and, (2) symptoms of arteriosclerotic heart disease (DX 26).

b. Dr. Anderson was deposed on October 3, 1986, at which time he recounted the findings of his February 28, 1986 report. Dr. Anderson reviewed the findings of his October 18, 1982 report and stated that, upon review of the entirety of the medical evidence, it is his opinion that the Miner does not have pneumoconiosis or any permanent pulmonary impairment and he retains the pulmonary and respiratory capacity to perform his usual coal mine work (DX 26).

2. a. Dr. Thomas A. Gallo, a Board-certified Internist and Pulmonologist, examined the Miner on May 24, 1983, at which time he reviewed the Miner's symptoms and his occupational ("worked 36 years in the strip mines"), medical (short of breath, chronic productive cough, hypertension), smoking (one-half to one pack of cigarettes per day for the past twenty years), and family histories, and performed a physical examination, pulmonary function study (no optimal tracings), arterial blood gas study (normal), interpreted an x-ray ("bilateral reticulonodulation compatible with pneumoconiosis, Category 1p"), and EKG (no diagnostic changes). Dr. Gallo diagnosed "coal worker's pneumoconiosis, category 1p" and "chronic bronchitis" (DX 26).

b. Dr. Gallo testified by deposition on April 19, 1984, at which time he recounted his earlier findings and opined that the Miner had coal workers' pneumoconiosis, category 1p, based on his years of exposure in the coal mining industry and his chest x-rays (DX 26).

3. a. Dr. Emery Lane, a Board-certified Internist, testified by deposition on June 6, 1983, at which time he recounted the findings of his March 1, 1983 examination of the Miner and

opined that the Miner had no evidence of pneumoconiosis and retained the pulmonary capacity to perform manual labor as a coal miner (DX 26).

b. Dr. Lane reported that he examined the Miner on March 1, 1983, at which time he reviewed the Miner's symptoms and his occupational (thirty-five and one-half years in strip mining), medical (pinched nerves in neck, numbness in left arm, shortness of breath, cough), smoking (smoked one-half to one pack of cigarettes per day for about twenty years), and family histories, and performed a physical examination, chest x-ray (0/0), pulmonary function test ("patient unable to cooperate to achieve reportable results"), arterial blood gas study ("very mild hypoxemia"), interpreted an x-ray (0/0), and an EKG ("unremarkable except for nonspecific ST and T wave abnormalities"). Dr. Lane diagnosed: (1) hypertensive cardiovascular disease, under treatment; (2) probable mild congestive heart failure; (3) chronic obstructive pulmonary disease; and, (4) no evidence of pneumoconiosis (DX 26).

4. Dr. Valentino S. Simpao examined the Miner on January 18, 1983, at which time he reviewed the Miner's symptoms and his occupational ("35 years surface mining"), medical (cough, sputum, wheezing, dyspnea, chest pain), smoking (smoked one-half pack of cigarettes per day for twenty years), and family histories, and performed a physical examination, pulmonary function study, and arterial blood gas study. Dr. Simpao diagnosed pulmonary fibrosis and chronic bronchitis (DX 26).

5. Dr. Robert E. Norsworthy examined the Miner on July 15, 1982, at which time he reviewed the Miner's symptoms and his occupational ("employed in mines from 1948 - 1982"), medical (shortness of breath, productive cough, occasional chest pain), smoking ("started smoking when he was 40 years of age and has smoked 1 package of cigarettes per day"), and family histories, and performed a physical examination, pulmonary function study ("markedly restrictive ventilatory defect"), arterial blood gas study, and interpreted an x-ray. Dr. Norsworthy diagnosed "early pneumoconiosis as evidenced from his symptomology [sic] and from his reduction is his PO2 to the lower functional limits at rest," as well as abnormal spirometry and history of exposure. In his opinion, the Miner "is no longer employable at manual labor" because of "his loss of pulmonary reserve" (DX 26).

E. Consultative Reports

1. Dr. William H. Anderson, a Board-certified Internist and Pulmonologist, reviewed medical evidence dated from July 15, 1982 through March 21, 1984, including examination reports by Drs. Norsworthy, Simpao, Lane, Gallo, O'Neill, and Penman, as well as arterial blood gas studies and pulmonary function tests conducted

by those physicians, and issued a consultative report dated February 28, 1986. Dr. Anderson opined that the Miner does not have any permanent pulmonary impairment and can perform his usual coal mine work (DX 26).

2. a. Dr. Richard P. O'Neill, a Board-certified Internist, reviewed medical records dated from July 1982 through May 1983, including an examination report by Dr. Anderson, dated October 28, 1982; six pulmonary function tests; and, five arterial blood gas studies, and issued a consultative report dated February 20, 1986. Dr. O'Neill opined that the Miner "has no evidence of significant respiratory functional impairment, has no respiratory disability, and ... has the respiratory capacity to perform his usual coal mine work ...." (DX 26).

b. Dr. O'Neill was deposed on August 23, 1983, at which time he recounted the findings of his June 29, 1983 examination of the Miner and opined that the Miner had no evidence of pneumoconiosis. In his opinion, the Miner suffered from chronic bronchitis due to cigarette smoking (DX 26).

F. Other Medical Evidence

1. Dr. Henry S. Stanley was deposed on August 24, 1983, at which time he recounted the findings of his examinations of the Miner regarding his shoulder injury. Dr. Stanley reported that he first examined the Mr. Devine on April 30, 1982, and that he treated the Miner for his shoulder pain at least forty-nine times since that visit (DX 26).

2. The record contains examination reports by Drs. Khan and Reich, dated July 6, 1982 and June 9, 1982, respectively, regarding their treatment of the Miner's left arm (DX 26).

3. The record contains a September 16, 1982 electromyelography report and a September 15, 1982 electroencephalogram conducted regarding the Miner's radiculopathy (DX 26).

4. Medical records from Regional Medical Center dated September 14, 1982 addressed the Miner's shoulder pain (DX 26).

5. Dr. William H. Pearson examined the Miner on August 6, 1982, regarding the Miner's neck and shoulder pain. Dr. Pearson reviewed the Miner's symptoms and his occupational (works for Peabody Coal Company), medical (injury at work caused numbness in left hand and shoulder), and family histories, and performed a physical examination and an EKG. Dr. Pearson diagnosed cervical root impingement (DX 26).

6. Examination reports from Trover Clinic dated from July 1966 through September 1982 address the Miner's complaints regarding hearing loss, ringing in the ears, and arthritis (DX 26).

7. Medical reports from Ohio County Hospital dated from January 1977 through February 1982 address the Miner's ankle injury, left arm pain, and lumbar and cervical strain (DX 26).

8. The record contains medical reports by Drs. Logan, Fuqua, and Elliot, dated from September 1976 to October 1976, regarding hearing loss, head pain, and dizziness suffered by the Miner in September 1976 (DX 26).

V. DISCUSSION AND APPLICABLE LAW

Miner's Claim

The Miner's first claim for benefits was denied by Decision and Order of Judge McElroy, dated March 2, 1987 (DX 26). The Miner did not appeal that denial, and the decision became final (DX 29). The Miner's second claim was filed on July 16, 1998 (DX 27, p. 96), and denied by OWCP on November 9, 1998 (DX 27, p. 30). OWCP informed the Miner that a request for a formal hearing must be made "within sixty (60) days of the date of this letter unless you notify us that you intend to submit additional evidence" (DX 27, p. 31). By letter dated December 31, 1998, and received by OWCP on January 6, 1999, the Miner submitted additional medical evidence and requested a formal hearing conducted by the Office of Administrative Law Judges (DX 27, p. 29). The Miner died on January 30, 1999 (DX 7). By letter dated May 19, 1999, OWCP notified the Claimant, Carrie E. Devine, that it had "reconsidered" all evidence in the Miner's claim and determined that the Miner's claim must be denied because he failed to establish total disability due to pneumoconiosis (DX 27, p. 4). The Claimant did not appeal OWCP's May 19, 1999 denial of the Miner's claim. In a letter dated August 3, 1999, OWCP wrote:

> " ... no appeal has been filed on the denial issued in Mr. Devine's claim on May 19, 1999. Accordingly, his claim has been administratively closed and is deemed abandoned."

(DX 27, p. 1).

At the formal hearing and in her post-hearing brief, the Claimant argued that the Miner's claim was not abandoned, as "no party had requested reconsideration in [the Miner's] claim and ... DOL never took action on [the Miner's] specific request for formal hearing before an Administrative Law Judge" (Brief for the Claimant, p. 6). As noted by the Claimant, 20 C.F.R. § 725.419(a) states:

> Within 30 days after the date of issuance of a proposed decision and order, any party may, in writing, request a revision of the proposed decision and order or a hearing. If a hearing is requested, the district director shall refer the claim to the Office of Administrative Law Judges.

The Miner was notified on November 9, 1998 that OWCP denied his claim, and that he had sixty days to request a formal hearing. The Miner requested a hearing before the Office of Administrative Law Judges by letter dated December 31, 1998, and received by OWCP on January 6, 1999 (DX 27, p. 29). OWCP did not comply with his request for a formal hearing. Instead, OWCP reviewed the newly submitted evidence and issued a subsequent denial on May 19, 1999 (DX 27, p. 4). When OWCP received no further requests from the Miner's estate for modification or for a hearing, it deemed the Miner's claim abandoned.

OWCP cannot defeat a request for a hearing simply by issuing a subsequent denial. Therefore, I find that the Miner filed a timely request for a hearing pursuant to 20 C.F.R. § 725.419(a).

Duplicate Claim Standard

Pursuant to § 725.2, all claims that were pending before the revision of the Act on January 19, 2001 shall be decided under the pre-revision version of § 725.309. This claim was pending at the time of the revision, thus the pre-revision language of the Act will be applied.

Twenty C.F.R. § 725.309(d) provides:

> In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met.

Twenty C.F.R. § 725.310(a) provides:

> ... upon the request of any party on the grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after

> the denial of a claim, reconsider the terms of an award or denial of benefits.

The Miner's first claim was filed on December 20, 1982 and finally denied on March 2, 1987. The second and instant Miner's claim was filed on July 16, 1998, more than one year after the previous denial and, therefore, constitutes a duplicate claim pursuant to § 725.309. The standard of review in a duplicate claim is a "material change in conditions." As the Miner's last coal mine employment was in the Commonwealth of Kentucky, the law of the Sixth Circuit Court of Appeals applies. For cases arising in the Sixth Circuit, *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 B.L.R. 2-10 (6th Cir. 1994) controls. In *Sharondale*, the Court adopted the following standard for determining whether a miner has established a material change in conditions:

> The ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Accordingly, I will review the recent medical evidence under the duplicate claim standard as stated in *Sharondale.* The "recent medical evidence" is that medical evidence dated subsequent to March 2, 1987, the date that the Miner's first claim was denied (DX 26). This evidence will be reviewed in order to determine whether a material change in conditions has been established. If a material change in conditions is established, then all the evidence of record must be reviewed to determine eligibility to benefits. In the prior claim, pneumoconiosis was established, but the Miner failed to establish total disability due to pneumoconiosis. The Claimant, on behalf of the estate of the Miner, must now establish that the Miner was totally disabled due to pneumoconiosis. If she is successful then she will have shown a material change in conditions, in which case the entire record will be reviewed.

Evaluation Under Section 718

Since this claim was filed after March 31, 1980, it must be adjudicated under the regulations at 20 C.F.R. § 718, *et seq.* To be entitled to benefits, the Claimant must establish that the Miner had pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that he was totally disabled as a result. In his March 2, 1987 Decision and Order Denying Benefits, Judge McElroy determined that the Miner suffered from pneumoconiosis, but denied benefits because total disability due to pneumoconiosis was

not established. Judge McElroy did not address whether the Miner's pneumoconiosis arose out of his coal mine employment (DX 26).

In *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) *(en banc* on reconsideration*)*, the Benefits Review Board held that a material change in conditions, pursuant to the standard set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 B.L.R. 2-10 (6th Cir. 1994), cannot be established based upon an element of entitlement that was not specifically adjudicated against the claimant in the prior litigation. Like the present case, *Caudill* arose within the jurisdiction of the Sixth Circuit Court of Appeals. In its Decision and Order on Reconsideration, *En Banc*, the Board held:

> ... an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does not constitute 'an element of entitlement previously adjudicated against a claimant.' Therefore, such an element may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. § 725.309 in accordance with [*Sharondale Corp. v.] Ross.*

Caudill, 22 B.L.R. 1-97, 1-102 (2000)(*en banc* on recon.).

Accordingly, only total disability, the element of entitlement previously adjudicated against the Miner, will be considered for the purpose of establishing a material change in conditions.

Total Disability

The criteria for establishing total disability due to pneumoconiosis is contained in § 718.204(b)(2).[11] Section 718.204(b)(2) permits a finding of total disability when there are pulmonary function studies with results equal to or less than those contained in the tables, arterial blood gas studies meeting the values listed in the tables, or where a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable or gainful work.

The record contains the results of two pulmonary function tests taken since March 2, 1987: Dr. O'Bryan's September 23, 1998 test, and Dr. Simpao's August 6, 1998 test. Drs. Fino and Branscomb found both tests to be invalid.

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[11] Section 718.204(b)(2)(iii) is inapplicable because there is no evidence of cor pulmonale with right-sided congestive heart failure.

Dr. Fino wrote that Dr. O'Bryan's September 23, 1998 pulmonary function test was invalid "due to a premature termination to exhalation, a lack of reproducibility in the expiratory tracings, and a lack of an abrupt onset to exhalation" (EX 3). Dr. Branscomb wrote that Dr. O'Bryan's September 23, 1998 pulmonary function test was invalid because no tracings are available (EX 2). Dr. O'Bryan did not note the Miner's cooperation or comprehension. The MVV was not noted. Based on the findings of Drs. Fino and Branscomb, I find this test invalid.

Dr. Fino wrote that Dr. Simpao's August 6, 1998 pulmonary function test was invalid because of a premature termination of exhalation and a lack of reproducibility in the expiratory tracings (EX 3). Dr. Branscomb wrote that Dr. Simpao's August 6, 1998 pulmonary function test was invalid because: no matches were obtained; maximum flow was not achieved until almost halfway through the breath, requiring excessive back extrapolation; no plateau was available, because expiration was continuing when the test was terminated; and, MVV breaths were much too slow, with excessive time spent in reversing the direction of breathing (EX 2). Dr. Simpao noted good cooperation and comprehension. I place substantial weight on the reviews by Drs. Fino and Branscomb, both of whom are Board-certified Internists and Pulmonologists, and find the August 6, 1998 pulmonary function study to be invalid.

The only arterial blood gas study performed since March 2, 1987 is Dr. Simpao's August 6, 1998 study, which produced results exceeding the table values (DX 27, p. 62).

Four physicians gave opinions subsequent to March 2, 1987, addressing whether the Miner was totally disabled. Drs. Fino, Branscomb, and Burki opined that the Miner was not disabled due to pneumoconiosis. Dr. Fino, a B reader and Board-certified Internist and Pulmonologist, reviewed the medical evidence of record and opined that, even assuming that the Miner had medical or legal pneumoconiosis, it did not contribute to his disability, and "he would have been as disabled had he never stepped foot in the mines" (EX 3). Dr. Branscomb, a Board-certified Internist and Pulmonologist, opined that, even if he assumed that the Miner had simple pneumoconiosis, the record "contains no indication that such pneumoconiosis was disabling" (EX 2). In his October 10, 1998 consultative report, Dr. Burki wrote that the Miner has no impairment, and that he has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment (DX 27, p. 47). Drs. Fino, Branscomb, and Burki specifically identified the studies upon which they relied, and their conclusions are consistent with the medical evidence of record. As such, I find that their reports are documented, reasoned, and supported by the medical evidence of record. While they are not examining physicians, their opinions are based on an

extensive review of the medical evidence and are entitled to substantial weight.

In his August 6, 1998 examination report, Dr. Simpao opined that the Miner does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment based on "objective findings on chest x-ray and pulmonary function test along with symptomatology and physical findings ..." (DX 27, pp. 53-56, 58). To the extent that Dr. Simpao relied on the Miner's pulmonary function tests to assess total disability, I accord his opinion less weight, as I found the pulmonary function tests to be invalid. While Dr. Simpao is the only examining physician to state an opinion as to the Miner's total disability, Drs. Fino and Branscomb had the advantage of reviewing the entire record as a whole, and Dr. Burki reviewed the medical evidence through October 10, 1998. Drs. Fino and Branscomb are both Board-certified Internists and Pulmonologists, and Dr. Fino is a B reader. The record does not contain information to establish that Dr. Simpao has comparable specialized diagnostic skills. I find that Dr. Simpao's opinion is outweighed by the opinions of Drs. Fino, Branscomb, and Burki, which are better reasoned, documented, and supported by the medical evidence of record.

For the reasons stated above, I find that the Claimant has not established that the Miner was totally disabled due to pneumoconiosis. Therefore, she has not shown a material change in conditions, and the Miner's claim must be denied.

Widow's Claim

To establish entitlement to benefits on a survivor's claim filed on or after January 1, 1982, a claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. Twenty C.F.R. §§ 718.202(a), 718.203(a), and 718.205(a).[12] In a Part 718 survivor's claim, the Administrative Law Judge must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) prior to considering whether the Miner's death was due to the disease under § 718.205. *See Trumbo v. Reading Anthracite Co.,* 17 B.L.R. 1-85, 1-88 (1993). As the Miner's last coal mine employment was in the Commonwealth of Kentucky, the law of the Sixth Circuit Court of Appeals applies.

In his March 2, 1987 Decision denying benefits, Judge McElroy found that the radiographic evidence supporting and disputing the existence of pneumoconiosis was in equipoise. The "true doubt"

[12] The revised regulations, effective January 19, 2001, make no substantive changes to these regulations.

rule was applied, and the existence of pneumoconiosis, pursuant to § 718.202(a)(1), was established. Since the determination of pneumoconiosis in the Miner's claim did not lead to an award of benefits, collateral estoppel cannot be applied to invoke a finding of pneumoconiosis in the Widow's claim. Pursuant to *Hughes v. Clinchfield Coal Co.,* 21 B.L.R. 1-134 (1999), where pneumoconiosis is found in a miner's claim, but the claim resulted in a denial of benefits, collateral estoppel may not be applied in the subsequent widow's claim, because the prior determination of pneumoconiosis was not a critical and necessary part of the judgment in the Miner's claim. *See Hughes v. Clinchfield Coal Co.,* 21 B.L.R. 1-134, 1-138 (1999). The prior determination of pneumoconiosis in the Miner's claim is of no effect in the Widow's claim. Therefore, the existence of pneumoconiosis arising out of coal mine employment must be established by a preponderance of the evidence.

Section 718.202 provides four means by which a claimant may establish pneumoconiosis. Under § 718.202(a)(1), a claimant may prove that the Miner had pneumoconiosis on the basis of x-ray evidence.

The record contains twenty-three readings of fourteen different x-rays. Nine of the interpretations are by physicians who are both B readers and Board-certified Radiologists. Interpretations by B readers are entitled to greater weight because of their expertise and proficiency in classifying x-rays. *See Aimone v. Morrison Knudson Co.,* 8 B.L.R. 1-32 (1985); *Vance v. Eastern Associated Coal Corp.,* 8 B.L.R. 1-68 (1985). Physicians who are Board-certified Radiologists as well as B readers may be accorded still greater weight. *Woodward v. Director, OWCP,* 991 F.2d 314, 316 n.4 (6th Cir. 1993). Eight of the nine readings by physicians who are both B readers and Board-certified Radiologists are negative for pneumoconiosis. Dr. Cole was the only dually qualified physician to read an x-ray as positive for pneumoconiosis, with his 2/1, p,s reading of the Miner's January 8, 1983 x-ray. Dr. Stokes, a Board-certified Radiologist, also read the Miner's January 8, 1983 x-ray as positive for pneumoconiosis. Dr. Wiot, a dually qualified reader, read this same x-ray as negative for pneumoconiosis.

The Miner's most recent x-rays, those dated between November 22, 1988 and January 26, 1999, were read twelve times. All twelve readings were negative, with the exception of Dr. Simpao's 2/2, p,p reading of the Miner's August 6, 1998 x-ray. Four other physicians, including Drs. Wiot and Sargent, who are both B readers and Board-certified Radiologists, read this x-ray as negative for pneumoconiosis.

I give greater weight to the interpretations by Drs. Sargent and Wiot, due to their superior diagnostic skills as a B readers and Board-certified Radiologists. While Dr. Cole is a dually

qualified physician, and Dr. Stokes is a Board-certified Radiologist, I find that their two positive readings are outweighed by the numerous negative readings by Drs. Sargent and Wiot, both dually qualified physicians. Therefore, I find that the x-ray evidence does not establish the existence of pneumoconiosis.

Under § 718.202(a)(2), a claimant may establish the existence of pneumoconiosis through biopsy or autopsy results. This section is inapplicable, because no autopsy or biopsy was performed.

Section 718.202(a)(3) provides that pneumoconiosis may be established if any of the several presumptions described in §§ 718.304, 718.305, or 718.306 are applicable. In the instant case, § 718.304 does not apply because there is no x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

Under § 718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. Pneumoconiosis is defined in § 718.201 as a chronic dust disease of the lungs, including respiratory or pulmonary impairments, arising out of coal mine employment. It is within the Administrative Law Judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. *See Lucostic v. United States Steel Corp.,* 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co.,* 8 B.L.R. 1-262, 1-265 (1985).

The record contains consultative reports by Drs. Fino, Branscomb, Caffrey, Hansbarger, Burki, Anderson, and O'Neill, and examination reports by Drs. O'Bryan, Simpao, Eric Norsworthy, Robert E. Norsworthy, Burton, Harrison, Gallo, Stanley, Lane, Anderson, Johnson, Beck, Pearson, Khan, Reich, Logan, Fuqua, Elliot, and Coffman.

Dr. Anderson, a Board-certified Internist and Pulmonologist, examined the Miner on October 18, 1982 and issued a subsequent consultative report on February 28, 1986. In his October 18, 1982 report, he initially diagnosed pneumoconiosis based on the Miner's chest x-ray. Upon review of the medical evidence as a whole, Dr. Anderson changed his opinion, and opined that the Miner did not have pneumoconiosis or any pulmonary impairment, and retained the pulmonary and respiratory capacity to perform his usual coal mine work (DX 26). Dr. Lane, a Board-certified Internist, examined the Miner on March 1, 1983 and opined that the Miner had no evidence of pneumoconiosis and retained the pulmonary capacity to perform

manual labor as a coal miner (DX 26). Dr. O'Neill, a Board-certified Internist, opined that the Miner had no evidence of pneumoconiosis and suffered from chronic bronchitis due to cigarette smoking (DX 26).

There is no diagnosis of pneumoconiosis in the remaining reports. The Miner's hospital records from Ohio County Hospital dated from January 26, 1999 to the Miner's death on January 30, 1999, completed by Drs. Norsworthy, Desai, and Park, do not mention pneumoconiosis (DX 9, 10). Examination reports and medical records from Trover Clinic, Ohio County Hospital, and Regional Medical Center, dated from July 1966 through September 1982, do not address pneumoconiosis (DX 26). Drs. Burton, Harrison, Stanley, Johnson, Pearson, Khan, Reich, Logan, Fuqua, Elliot, and Coffman examined the Miner for conditions unrelated to pneumoconiosis or any pulmonary or respiratory condition (DX 9, 10, 26). These reports do not address the presence or absence of pneumoconiosis.

The most recent reports that examine the totality of the medical evidence and address the existence of pneumoconiosis are those by Drs. Fino, Branscomb, Caffrey, Hansbarger, and Burki. Drs. Fino and Branscomb have expertise in Internal Medicine, while Dr. Caffrey has expertise in Anatomical and Clinical Pathology, and Dr. Hansbarger has expertise in Pathology and Forensic Medicine. Dr. Fino opined that "[t]here is insufficient medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis" (EX 3). Dr. Branscomb wrote that the Miner "did not contract an occupational lung disease associated with coal mine employment" (EX 2). Dr. Caffrey stated that he "[could] not objectively say that [the Miner] had or did not have coal worker's pneumoconiosis (EX 1). Dr. Hansbarger opined that the Miner did not suffer from coal workers' pneumoconiosis (EX 1). In his October 10, 1998 consultative report, Dr. Burki wrote that the Miner has no impairment, and that his chest x-rays show no pneumoconiosis (DX 27, p. 47). Drs. Fino, Branscomb, Caffrey, Hansbarger, and Burki had the benefit of comparing the entirety of the medical evidence of record, and they thoroughly documented their conclusions. These physicians specifically identified the studies upon which they relied, and their conclusions are consistent with the medical evidence of record. *See Church v. Eastern Assoc. Coal Corp.,* 20 B.L.R. 1-8 (1996). As such, I find that the reports by Drs. Fino, Branscomb, Caffrey, Hansbarger, and Burki are documented, reasoned, and supported by the medical evidence of record. While they are not examining physicians, their opinions are based on an extensive review of the medical evidence and are entitled to substantial weight.

Drs. O'Bryan, Simpao, Eric Norsworthy, Robert E. Norsworthy, and Gallo diagnosed pneumoconiosis. Dr. O'Bryan diagnosed category one pneumoconiosis based on a pulmonary function test, arterial blood gas study, and x-ray (DX 9, 27, pp. 50-51). I have found the

x-ray evidence to be negative for pneumoconiosis. The pulmonary function test on which he relied was found to be invalid by Drs. Fino and Branscomb. The record does not contain a copy of Dr. O'Bryan's pulmonary function study or tracings. Dr. O'Bryan also noted that he relied on the Miner's arterial blood gas study to diagnose pneumoconiosis. However, a copy of his arterial blood gas study is not included in the record. For these reasons, I find that his opinion is entitled to less weight.

Dr. Simpao diagnosed pneumoconiosis based on "multiple years of coal dust exposure ... findings on chest x-ray and pulmonary function test along with physical findings and symptomotology [sic]" (DX 27, pp. 53-56, 58). Dr. Simpao relied on a positive x-ray interpretation and the pulmonary function study upon which he relied was found to be invalid by Drs. Fino and Branscomb. Additionally, the arterial blood gas study was within normal limits. For these reasons, I accord his opinion less weight.

Dr. Eric Norsworthy treated the Miner from 1986 until the Miner's death in 1999 and diagnosed pneumoconiosis, based upon his examination of the Miner and the Miner's x-rays and symptoms (DX 9; CX 1). To the extent that Dr. Eric Norsworthy relied on the Miner's x-rays to diagnose pneumoconiosis, I accord his opinion less weight, as I found the x-ray evidence to be negative for pneumoconiosis.

Dr. Robert E. Norsworthy diagnosed pneumoconiosis based on the Miner's symptomatology, arterial blood gas and pulmonary function studies, and history of exposure (DX 26). The data from his pulmonary function test on which he relied is unreadable, no tracings were included, and the study was found to be invalid. The record does not include a copy of the arterial blood gas study upon which he relied. For these reasons, I accord Dr. Robert E. Norsworthy's opinion less weight.

Dr. Gallo, a Board-certified Internist and Pulmonologist, examined the Miner on May 24, 1983 and diagnosed pneumoconiosis, based on his years of exposure in the coal mining industry and his chest x-rays (DX 26). I accord his opinion less weight, as I found the x-ray evidence negative for pneumoconiosis and because length of coal mine employment is an insufficient basis for a finding of pneumoconiosis.

I find that the opinions of Drs. O'Bryan, Simpao, Eric Norsworthy, Robert E. Norsworthy, and Gallo are outweighed by the opinions of Drs. Fino, Branscomb, Caffrey, Hansbarger, and Burki, which are better reasoned, documented, and supported by the medical evidence of record. A reasoned opinion is one in which the Administrative Law Judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987). Whether a medical

report is sufficiently documented and reasoned is for the Judge as the finder of fact to decide. *Clark v. Karst-Robbins Coal Co.,* 12 B.L.R. 10149 (1989) *(en banc).* For the reasons stated above, I find that the medical opinion evidence fails to support a finding of pneumoconiosis.

Because I found the evidence to be negative for pneumoconiosis, I find that the existence of "clinical pneumoconiosis" has not been established pursuant to 20 C.F.R. § 718.201(a)(1).

None of the physicians diagnosed the Miner as suffering from a chronic lung disease or impairment and its sequelae arising out of coal mine employment. Therefore, I find that the existence of "legal pneumoconiosis" has not been established pursuant to 20 C.F.R. § 718.201(a)(2).

Assuming, arguendo, that the evidence did establish the existence of pneumoconiosis, the Claimant would have to establish that the Miner's death was due to pneumoconiosis in order to be entitled to benefits.

For survivors' claims filed on or after January 1, 1982, § 718.205(c) provides three means by which death due to pneumoconiosis may be established: (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death; or, (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis; or, (3) Where the presumption set forth at § 718.304 [complicated pneumoconiosis] is applicable. According to § 718.205(c)(5), pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. § 718.205(c). The United States Court of Appeals for the Sixth Circuit held that pneumoconiosis is a substantially contributing cause or factor leading to the Miner's death if it serves to hasten that death in any way. *Griffith v. Director, OWCP,* 49 F.3d 184 (6th Cir. 1995). This means that any acceleration of the miner's death attributable to pneumoconiosis, however small, will qualify as a substantially contributing cause of death and entitle the widow to benefits.

The Miner's death certificate, completed by Dr. Eric Norsworthy, lists the immediate cause of death as lung cancer with metastatic disease, due to or as a consequence of bladder cancer; arteriosclerotic heart disease, due to or as a consequence of chronic obstructive pulmonary disease, due to or as a consequence of coal miner's black lung disease (DX 7). The records of the Miner's admission to Ohio County Hospital prior to his death do not mention pneumoconiosis (DX 9, 10).

The record contains the opinions of five physicians: Drs. Fino, Branscomb, Caffrey, Hansbarger, and Eric Norsworthy, who address the issue of whether pneumoconiosis caused or hastened the Miner's death. These are the only reports that specifically address the cause of the Miner's death.

Dr. Fino stated that, even assuming the Miner had medical or legal pneumoconiosis, it did not contribute to his death, and that the Miner "would have died as and when he did due to lung cancer had he never stepped foot in the mines" (EX 3). Dr. Branscomb wrote that the Miner died due to cancer, and that, even assuming that the Miner had simple pneumoconiosis, it did not cause, aggravate, or accelerate his death from cancer" (EX 2). Dr. Caffrey opined that the Miner's death was due to carcinoma, and that even if he had pneumoconiosis, it was a "mild degree of simple coal workers' pneumoconiosis [and it] did not contribute to or hasten his death" (EX 1). Dr. Hansbarger opined that the Miner's death was not contributed to, caused by, or hastened by coal mine employment, and that his death was caused by "carcinoma of the lung which is not related to occupational exposure to coal dust" (EX 1).

Dr. Eric Norsworthy wrote that the Miner's death was caused or hastened by his exposure to both cigarettes and coal workers' pneumoconiosis (DX 11). The Miner's death certificate, signed by Dr. Norsworthy, mentions pneumoconiosis as a contributing cause of death. However, I found the evidence to be negative for pneumoconiosis. Additionally, the records from the Miner's hospital admission prior to his death do not mention pneumoconiosis. Dr. Norsworthy also opined that the Miner's bladder cancer may have resulted from "inhalation of lime dust used to press coal dust in the coal mines" (EX 4). In response, Drs. Fino and Branscomb wrote that there is no medical literature which establishes a relationship between lime dust and bladder cancer (EX 1, 5). Dr. Branscomb noted that "it has been well established since at least 1955 that cigarette smoking increases the risk of bladder cancer" (EX 5). Drs. Fino, Branscomb, Caffrey, and Hansbarger thoroughly reviewed the evidence of record and stated the reasons for their conclusions. I find that their reports are better reasoned, documented, and supported by the medical evidence of record than that of Dr. Eric Norsworthy. Drs. Fino and Branscomb are Board-certified Internists and Pulmonologists, and Dr. Fino is a B reader. Dr. Caffrey is a Board-certified Anatomical and Clinical Pathologist, and Dr. Hansbarger is a Board-certified Pathologist and Forensic Physician. The record does not contain any information to establish that Dr. Eric Norsworthy has comparable specialized diagnostic skills.

For the reasons stated above, I find that the opinions of Drs. Fino, Branscomb, Caffrey, and Hansbarger are entitled to greater weight than the opinion of Dr. Eric Norsworthy. There is not sufficient evidence of record to support the Claimant's burden of

proof that the Miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the Miner's death.

VI. ENTITLEMENT

The Claimant has failed to establish that the Miner was totally disabled due to pneumoconiosis. Therefore, the Claimant has not established entitlement to benefits in the Miner's claim. Carrie E. Devine, Widow of George M. Devine, Jr., has not shown that the Miner suffered from pneumoconiosis, that his death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the Miner's death. Therefore, she has failed to establish entitlement to widow's benefits under the Act.

VII. ATTORNEY'S FEES

The award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

VIII. ORDER

It is, therefore,

ORDERED that the claims of George M. Devine, Jr., and Carrie E. Devine, Widow of George M. Devine, Jr., for benefits under the Act are hereby DENIED.

A
ROBERT L. HILLYARD
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, P.O. Box 37601, Room S-5220, Washington, D.C., 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.